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In the Supreme Court of the United States

OCTOBER TERM, 1987

AVIS RENT-A-CAR OF PUERTO RICO, INC.,
PETITIONER,

v.

JOHN G. MARSHALL, ET ALS; and
JOSE E. PEREZ ARZUAGA, ET ALS.,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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I

Questions Presented

1. Whether in a diversity action based on tort, the decision of the district court (adopted by the Court of Appeals) to submit the issue of causation to the jury rather than the trial judge resolving same as mandated by Puerto Rico law* conflicts with the decisions of this Court in *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938); *Guaranty Trust Co.* v. *York*, 326 U.S. 99 (1945); and *Hanna* v. *Plumer*, 380 U.S. 460 (1965)?

2. Whether the decisions of the courts below to deny petitioner's motions for directed verdict and for judgment N.O.V. constitute an inequitable administration of the law, encourages "forum-shopping", and/or departs from the accepted and usual course of judicial proceedings?

3. Whether the decision of the Court of Appeals conflicts with its own precedent in *Karelitz* v. *Damson Oil Corp.*, 820 F.2d 529 (1st Cir. 1987), when no reasonable juror could have found adequate causation in the instant case?

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* Puerto Rico is governed by civil law rather than common law, and civil cases are tried without a jury.

II

The Parties

Petitioner is Avis Rent-A-Car of Puerto Rico, Inc. ("Avis").

Avis Rent-A-Car of Puerto Rico, Inc. is wholly-owned by Avis Caribbean LTD, which, in turn, is wholly-owned by Avis, Inc.

Respondents are John G. Marshall, his wife, Margaret Marshall, the conjugal partnership they constitute jointly, and both together with patria potestas of their minor children, John and Kerri Marshall ("Marshall"); and Jose E. Perez Arzuaga, the conjugal partnership constituted between J. Perez Arzuaga and his wife, Jane Doe; John Doe, Richard Roe Insurance Co., and XYZ Insurance Company ("Perez").

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PETITIONER,

v.

JOHN G. MARSHALL, ET ALS; and
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RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Opinions Below

The prior opinions most pertinent to this petition are the September 1, 1987 Opinion of the United States Court of Appeals, 828 F.2d 845 (1st Cir. 1987) (Judge Torruella dissenting), reproduced in the Appendix at A-1,[1] and the unreported Opinion and Order of the District Court for the District of Puerto Rico entered on November 12, 1985 (A-23).

Jurisdiction

The Judgment of the United States Court of Appeals for the First Circuit was entered on September 1, 1987 (A-21). Rehearing and Suggestion for Rehearing En Banc was denied on September 28, 1987 (A-22). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

[1] Page references to the Appendix to this Petition are cited "(A. __)".

Constitutional Provision Involved

This Petition involves the Seventh Amendment to the Constitution of the United States which provides that "[i]n suits at common law where the value in controversy shall exceed twenty dollars the right of trial by jury shall be preserved. . . ".

Statement of the Case

I. Nature of the Case

This is a personal injury tort case wherein petitioner Avis was held liable for the damages suffered by respondent Marshall in a car accident notwithstanding the existence of an intervening and proximate cause not under the control of Avis, *i.e.*, respondent Perez' negligent driving.

Succinctly stated, on August 23, 1982 Marshall rented a car from Avis. Four days later, on August 27, 1982, he returned to the Avis terminal at the airport for a tire change because he had hit a pothole that caused the right front tire to go flat. After leaving the Avis terminal and traveling about 200-300 yards, he stopped his vehicle on a straight road (the airport exit road), got out of his car, walked to the left rear (driver's side) of the car, and saw that the left rear tire was flat. Thereafter, the left rear part of the Avis car and Mr. Marshall were struck by a Mercedes Benz vehicle driven by Perez.

II. The Proceedings Below

A. *The Proceedings in the District Court*

On April 23, 1983 Marshall filed a personal injury tort claim against Perez in the United States District Court for the District of Puerto Rico, Civil Number 83-0966 (GG). However, on July 20, 1983, Marshall amended his complaint to include Avis as a codefendant claiming, in essence, that Avis rented Marshall a defective vehicle. Perez first filed a third-party action against Avis, then filed a crossclaim against Avis.

The jurisdiction of the district court was invoked under 28 U.S.C. §1332 because of diversity of citizenship, plaintiff being a citizen of the State of Pennsylvania and defendants citizens of Puerto Rico.

After a seven (7) day trial, the jury returned a verdict for Marshall in the total amount of $750,000, and the jury apportioned the negligence 40% against Avis and 60% against Perez. At the close of Perez' case, Avis petitioned for dismissal of the crossclaim and third-party claim by Perez against Avis. The court granted that motion and dismissed all such claims. Avis also timely petitioned the district court for a directed verdict at the close of plaintiff's case and for Judgment N.O.V. or alternatively, a new trial, after the case was submitted by all sides. The district court (Judge Gilberto Gierbolini) denied all of Avis' motions on November 12, 1985 (A-28). Twenty (20) days later, on December 2, 1985, Avis filed a timely notice of appeal to the First Circuit Court of Appeals.

B. *The Decision of the Court of Appeals*

On September 1, 1987, the United States Court of Appeals for the First Circuit (Judge Torruella dissenting) affirmed in full the district court's judgment. In its Opinion and Order, the Court of Appeals incorrectly found that federal law was controlling in determining whether the issue of causation should be delegated to the jury for resolution or whether same should be resolved by the trial judge because Puerto Rico "never uses juries in civil cases. . ."

This petition addresses the judgment of the Court of Appeals insofar as it adopts the district court's decision that the issue of causation in this case is to be determined by a jury rather than a judge.

Reasons for Granting the Writ

I. THE DECISION OF THE FIRST CIRCUIT COURT OF APPEALS IS IN DIRECT CONFLICT WITH *Erie R. Co.* v. *Tompkins*, AND ITS PROGENY.

A. *Introduction*

The accident which gave rise to the instant case occurred in Puerto Rico. Therefore, the Federal District Court in Puerto Rico in this diversity case is bound to follow the substantive Puerto Rico law that would be applied if the trial were to be held in a Commonwealth of Puerto Rico court, *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938). A Federal District Court sitting in Puerto Rico may not legally reach (as in this case) a substantially different result than would have been reached upon a trial of the same case "in a state court a block away". *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 109 (1945).

B. *Under Its Civil Law System Causation in a Personal Injury Tort Action in Puerto Rico Is Always Resolved by the Trial Judge Since Civil Cases Are Tried Non-Jury.*

Puerto Rico is a civil law jurisdiction which is not obligated to follow "common law" precepts. *Vda. de Fornaris* v. *Amer. Surety Co. of NY*, 93 P.R.R. 28 (1966). The idea of trying a civil action before a jury is totally extraneous to the judicial system that operates and has always operated in Puerto Rico.

Neither Puerto Rico's Constitution nor its laws recognize nor provide for trial by jury in civil cases. *Garcia Mercado* v. *Tribunal*, 99 P.R.R. 287 (1970). In Puerto Rico *all* actions of a civil nature are entertained and resolved exclusively by a trial judge. *Id.* In addition, the issue of causation has always been reserved for the judge's resolution. *Estremera* v. *Inmobiliaria Rac, Inc.*, 109 D.P.R. 852 (1980) (quoting 3 Castan Tobenas, *Derecho Civil Espanol Comun y Foral*, 237 (1978)). The

judge's point of view is the "most adequate" for setting the bounds of liability, *see* 31 Scaevola, *Codigo Civil*, 361 (2d ed. 1974), regardless of Puerto Rico's want of expertise with juries in civil cases. *Cf. Pan American World Airways* v. *Ramos*, 357 F.2d 341, 342 (1st Cir. 1966).

A federal court in a diversity case should not simply discard the civil law of the forum (Puerto Rico) in the absence of an express mandate.[2] It should attempt to follow the law and practice of Puerto Rico as closely as possible. *Erie R. Co.* v. *Tompkins*, *supra*. Where local law qualifies or *abridges* the right (to trial by jury), the federal court must follow suit. Otherwise, there is a different measure of the cause of action in one court than in the other, and the principle of *Erie* is transgressed. *See*, *Byrd* v. *Blue Ridge Cooperative*, 356 U.S. 525, 550 (1957) (Justice J. Whittaker dissenting); *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 109 (1945).

In his dissent in this case, Appellate Judge Torruella (formerly Chief Judge of the Federal District Court in Puerto Rico) recognized that if this tort case had been litigated before a judge in the local courts, the outcome could well have been different. Judge Torruella also recognized the issue of causation should have been resolved by the trial judge in order to avoid the inequitable administration of the law between state and federal courts and to discourage forum shopping. *See*, *Hanna* v. *Plumer*, 380 U.S. 460 (1965). As matters now stand, a litigant in an automobile diversity tort case is allowed the privilege of trial by jury (not recognized in Puerto Rico) merely because he is a non-resident; hence, all such litigants are encouraged to "forum shop". This has led to an overburdened court that has grown from one (1) judge in 1970 to seven (7) judges in 1987, without a corresponding growth in the population of Puerto Rico.

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[2] If the question is open under the laws of Puerto Rico, federal courts can certify the question to the Commonwealth Supreme Court for resolution. *In re Torruella Serralles*, 684 F.2d 170 (1st Cir. 1982); *Pan. Amer. Comp. Corp.* v. *Data Gen. Corp.*, 112 D.P.R. 780 (1982).

Puerto Rico's case law regarding causation has always been resolved by a judge; to resolve the same issue through the use of a jury, which does not have the civil-law knowledge and expertise of a judge, will result in the inequitable administration of the law.

It is well known that juries tend to compensate a plaintiff for his damages by scrutiny of the "deep pocket" defendants rather than entertaining the highly complicated legal contours of the causation doctrine.

Succinctly stated, it was error for the trial judge to use a jury to resolve the legal issue of "*causa adecuada*" (see *infra*), since the use of a diversity civil jury in the Federal District Court of Puerto Rico is improper under *Erie*. Moreso, when it is considered that the Seventh Amendment right to a trial by jury is not applicable to Puerto Rico because it is not a "fundamental right". *People* v. *Balzac*, 258 U.S. 298, 310-311 (1922).

C. *Under the Current Civil Law Doctrine of "Causa Adecuada", Avis Cannot Be Held Liable for a Third Party's Intervening Negligence Which, Although "Possibly" or Remotely Foreseeable, Was Not Ordinary nor Probable.*

The Puerto Rico Supreme Court has emphasized that only those damages which are the *probable* consequences of an act or those which form part of the consequences that a reasonable man should have foreseen can be said to be causally related to the negligent act or omission. *Torres Trumbull* v. *Pesquera*, 97 P.R.R. 329, 335 (1969). Surely, Avis could not foresee within any degree of probability that Marshall would be struck by codefendant Perez' vehicle as he inspected a flat tire. According to ordinary, common and general experience, a flat tire inspection by a car owner does not give rise to a "probable" accident wherein the automobile owner is struck by an oncoming vehicle. The flat tire on the Avis vehicle was not the legal or adequate cause of the damages suffered by Marshall. *See Jimenez* v. *Pelegrina Espinet*, 112 D.P.R. 700 (1982).

Perez' reckless driving was the sole legal cause of the accident. Avis cannot be and should not be held liable for the extraordinary series of events that developed after its contact with Marshall and over which Avis did not have any control. Perez' intervention had the effect of breaking any causal relationship existing between Avis and Marshall. *Id.* Avis could not foresee that Perez would violate the law and cause an accident; such intervening conduct by a party alien to Avis cannot form a basis for the imposition of liability against it, *Rivera* v. *Cruz Corchado*, __ D.P.R. __, 87 J.T.S. 51 (1987).

D. *The Decision of the Courts Below Regarding the Foreseeability of an Event Has Far Reaching Consequences Contrary to Puerto Rico's Public Policy of Limiting a Defendant's Liability, Which Calls for an Exercise of This Court's Power of Supervision.*

The decision of the courts below effectively imposes liability upon a defendant for all damages it could possibly and remotely foresee. Such a result can have unreasonable far-reaching effects upon future cases, especially the approximately (1,000) or more cases which involve the Dupont Plaza Hotel catastrophic fire in Puerto Rico, where 97 persons died and hundreds were injured. The newly established doctrine by the panel of liability based upon "possible" and "remote" foreseeability rather than the applicable Puerto Rico standard of "causa eficiente" and/or "causa adecuada" (legal, efficient or probable foreseeability) will result in hundreds or perhaps thousands of defendants being brought into the aforementioned catastrophic fire cases on such untenable grounds, *e.g.*, as manufacturing the Sterno can that was used by the arsonist to cause the inferno. *See Estremera* v. *Inmobiliaria Rac, Inc.*, 109 D.P.R. 852 (1980); *Santiago* v. *Becton Dickinson Co., S.A.*, 571 F. Supp. 904 (D.P.R. 1983).

Indeed, the decision of the trial judge and the Court of Appeals in allowing a jury to resolve the civil law legal issue of "efficient cause" will have such far-reaching effect that any car that is stopped on the road and its driver is struck by another vehicle (or the driver is held up by thieves) will have an action for recovery of damages against the auto manufacturer (or other deep pockets) alleging an auto defect.

II. The Denial of Petitioner's Motions for Directed Verdict and for Judgment N.O.V. Constitutes a Departure From the Usual and Accepted Course of Judicial Proceedings and Thus, Calls for This Court's Intervention To Secure and Maintain Uniformity of Decisions.

As previously stated, causation, whether it be a question of fact, law, or both, is for the *judge* to resolve under the Puerto Rico civil law jurisdiction. *Estremera* v. *Inmobiliaria Rac., Inc., supra.* The instant cause of action did not arise under federal law, but under Puerto Rico law. The plaintiff in the instant diversity case was not entitled to trial by jury. A jury should not be allowed to disrupt or alter the essential character or function of the district court and allowed to resolve legal issues which is a function traditionally reserved to a judge in Puerto Rico. Therefore, even if the facts of the case were delegated to the jury, the trial judge was under the obligation of applying the pertinent Puerto Rico case law to the facts and resolving the issue of causation. In the instant case, causation was improperly submitted to the jury.

III. The Decision of the Court of Appeals Is Contrary to Its Own Precedent Enunciated in *Karelitz* v. *Damson Oil Corp.* and Thus Calls for This Court's Supervisory Power.

In *Karelitz*, the jury in a contract dispute action found for plaintiff on the causation question. The district court, however, correctly set aside the verdict and granted judgment N.O.V. for defendant. This Court affirmed the district court's judgment N.O.V. in that case since no reasonable juror could have found the legally necessary causal relation to establish liability. The same is true in the instant case. Avis could no more have foreseen that Perez would drive recklessly and hit plaintiff Marshall than it could have foreseen that Perez was going to drive by, or that Marshall's auto tire would go flat where it did.

Judge Torruella's dissenting opinion focused on the proper standard for determining causation, to wit:

> "Would Avis be responsible if instead of being hit by Perez Arzuaga, Marshall had been held up by Perez Arzuaga? I think not because the risk of robbery, as the risk of reckless driving, is not an ordinary, usual, and foreseeable risk of a car rental company's negligence. *See Rivera Torres, supra*; *Negron* v. *Noriega*, __ D.P.R. __, 86 J.T.S. 75 (1986); *see also Estremera*, 109 D.P.R. at 856-57; *Jacob* v. *Eagle Star Insurance Co.*, 640 F. Supp. 117, 119 (D.P.R. 1986) (applying Puerto Rico substantive law)."

Nonetheless, the Court of Appeals' majority concluded that a juror could reasonably find the necessary causal relation to establish Avis' liability. This outcome (reached through speculation) leads to the "deep pocket" theory of recovery and converts Avis into an insurer. *See* Judge Torruella's dissenting opinion in this case; *see also* H. Brau, *Danos y Perjuicios Extracontractuales en Puerto Rico* § 11.03[6](c) at 713 (2d ed. 1986). It is respectfully submitted that the court of appeals has created an inconsistency in its decisions. Review should be granted to maintain uniformity of decisions.

Conclusion

This petition merits review because the courts below failed to comply with this Court's decisions in *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), *Guaranty Trust Co.* v. *York*, 326 U.S. 99 (1945), and *Hanna* v. *Plumer*, 380 U.S. 460 (1965), which mandate that district courts follow state law (Puerto Rico civil law) to the effect that in a diversity tort case, the issue of causation is to be entertained and resolved by the trial judge and not by the jury. The decision of the district court (adopted by the Court of Appeals) to submit the issue of causation to the jury, and its denial to grant petitioner's motions for directed verdict and/or for judgment N.O.V. constitutes an inequitable administration of the law, encourages "forum-shopping", and/or departs from the accepted and usual course of proceedings so as to call for this Court's power of supervision.

Review is further warranted because the decision of the Court of Appeals conflicts with its own precedent in *Karelitz* v. *Damson Oil Corp.*, 820 F.2d 529 (1st Cir. 1987) since no reasonable juror could have found adequate causation in the instant case.

For all of the aforesaid reasons, the Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit should be granted.

Respectfully submitted,

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United States Court of Appeals
For the First Circuit

No. 86-1006

JOHN G. MARSHALL, ET AL.,

PLAINTIFFS, APPELLEES,

v.

JOSE E. PEREZ ARZUAGA, ET AL.,

DEFENDANTS AND THIRD-PARTY PLAINTIFFS, APPELLEES.

AVIS RENT-A-CAR OF PUERTO RICO, INC.,

THIRD-PARTY DEFENDANT, APPELLANT.

No. 86-1007

JOHN G. MARSHALL, ET AL.,

PLAINTIFFS, APPELLANTS,

v.

JOSE E. PEREZ ARZUAGA, ET AL.,

DEFENDANTS, APPELLEES.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO
[HON. GILBERTO GIERBOLINI, *U.S. District Judge*]

Before
CAMPBELL, *Chief Judge*,
TORRUELLA and SELYA, *Circuit Judges*.

Charles A. Cordero with whom *Cordero, Colon & Miranda* was on brief for Avis Rent-A-Car of Puerto Rico, Inc.

Herbert W. Brown, III with whom *Peter J. Satz*, and *Calvesbert & Brown* were on brief for John G. Marshall.

September 1, 1987

CAMPBELL, *Chief Judge*. On August 23, 1982, John G. Marshall and his wife rented a 1982 Dodge Aries K from the Avis Rent-A-Car terminal located near the Luis Munoz Marin International Airport in San Juan, Puerto Rico. Marshall drove the vehicle without problem until August 27, 1982, when he hit a pothole, causing the right front tire to go flat. Marshall changed the tire with the "balloon" type spare, and subsequently returned to the Avis terminal for a replacement tire. The company changed both front tires but neither of the back tires; at trial, evidence demonstrated that the rear tires were original equipment, having been on the car for over nine months and 15,000 miles.

After Avis's service personnel replaced the two front tires, Marshall drove from the rental facility onto the airport exit road, a two-lane highway leading from the airport. Marshall testified that shortly after he turned onto the exit road, he felt the car "vibrating from the back end." Unaware of the source of the vibration, he continued to drive for approximately another 200 yards. At that point, the vibration was, in Marshall's words, getting "really bad." Consequently, he stopped the car on the far right side of the right-hand lane, unable to pull over any further because the highway had neither a shoulder nor a breakdown lane. He had travelled less than a mile from the Avis facility.

Marshall then got out of the car to investigate the cause of the disability, allegedly first checking for oncoming traffic. When he reached the left rear tire, he noticed that it was "just about completely flat." After kicking and cursing the tire, he began walking back toward the center of the car. He was immediately struck and injured by a passing car driven by Jose Perez Arzuaga. The accident occurred on a straight road, during daylight and, by Marshall's admission, when conditions were clear and "visible."

At trial, Perez Arzuaga testified that prior to the accident, he had been driving in the right lane of the airport exit road. He stated that when he first saw Marshall's car, he believed that it was moving. Not until he was approximately 30 feet away from the disabled vehicle did Perez Arzuaga realize that the car was stationary. He then attempted to move into the left-hand lane, but could not do so because a blue car was rapidly approaching in that lane. When Perez Arzuaga tried to pass between the blue car on the left and Marshall's disabled vehicle on the right, he miscalculated, hitting both Marshall and the left rear side of the rental car. At trial, Perez Arzuaga testified that he did not see Marshall until the moment the accident occurred.

On April 23, 1983, John Marshall, his wife, and their two minor children initiated this negligence action against Perez Arzuaga in the United States District Court for the District of Puerto Rico.[1] Federal jurisdiction was predicated on the diversity of the parties, 28 U.S.C. §1332 (1982). Plaintiffs subsequently filed an amended complaint that included Avis Rent-A-Car of Puerto Rico as a codefendant and joint tortfeasor. The theory underlying plaintiffs' suit against Avis was that the company had negligently leased to Marshall a car with a defective and worn tire, thereby putting him at risk for an accident of the type that occurred. After seven days of trial, the jury returned a verdict for plaintiffs, placing 40 percent of the responsibility for the accident on Avis, and 60 percent on Perez Arzuaga (it concluded that John Marshall had not been contributorily negligent). The jury awarded damages totalling $750,000.

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[1] Marshall's wife was in the automobile at the time of the accident, but apparently suffered no physical injuries. The complaint alleged that Perez Arzuaga'a negligence deprived her of, among other things, consortium, society, and services. The two children, though not in the car when the accident occurred, sought recovery for losses such as deprivation of pecuniary support and expectancy of inheritance.

Avis appeals from the judgment entered against it below, claiming that the district court erred by (1) refusing to grant a directed verdict in the company's favor, (2) allowing one of plaintiffs' witnesses, Gerald Rosenbluth, to testify as an expert, and (3) failing to strike certain of Rosenbluth's statements. Plaintiffs also appeal, contending that the district court improperly refused to assess attorneys' fees against Perez Arzuaga. We affirm.

I.

Avis contends the district court erred in refusing to direct a verdict in favor of the company. Avis insists that, as a matter of law, the accident was not reasonably foreseeable; thus, the issue never should have reached the jury. We disagree.

A. *Foreseeability*

The substantive law of Puerto Rico provides the rule of decision in this diversity case.[2] Under the case law developed in the Commonwealth, tortious liability requires both "fault"[3] and "the necessary causal nexus between the wrongful act and the damage sustained." *Jimenez* v. *Pelegrina*, 112 P.R.R. 881, 885 (1982). The "causal nexus" principle limits a party's liability for hazards flowing from its negligence to those hazards that could be " 'anticipated by a prudent person.' " *Pacheco* v. *Puerto Rico Water Resources Authority*, 112 P.R. S. Ct. Official Translations 369, 372 (1982) (quoting *Hernandez* v. *The Capital*, 81 P.R.R. 998, 1005 (1960)). In Puerto Rico, just as in the common law jurisdictions, foreseeability is the touchstone of extracontractual liability. *Rivera* v. *Cruz*, __ P.R.R. __, 87 J.T.S. 51 (May 20, 1987). Foreseeable events are those that may "be calculated by a prudent conduct alert to eventualities that may be expected in the course of life.' "

---

[2] *See Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938).

[3] The evidence was sufficient to permit a finding that Avis had negligently leased to Marshall a car with a defective tire. Thus, in considering whether the district court properly refused to direct a verdict in Avis' favor, we shall assume Avis was negligent.

Jimenez, 112 P.R.R. at 888 (quoting Supreme Court of Spain, Judgment of November 9, 1949); *see also Torres Trumbull* v. *Pesquera*, 97 P.R.R. 329, 335 (1969); *Widow of Andino* v. *Puerto Rico Water Resources Authority*, 93 P.R.R. 168, 178-79 (1966).

Avis argues it is not liable for Marshall's injuries because it could not have foreseen the exact sequence of events that preceded the accident. But the Supreme Court of Puerto Rico has made clear that this argument, which suggests only prophets could be found tortiously liable, misunderstands the requirement of foreseeability:

> The rule of foreseeability does not mean that the precise risk or the exact result which was encountered should have been foreseen. The essential factor is to be under a duty to foresee, in a general way, consequences of a particular type. It is no defense to allege that the precise course or the full extent of the consequences could not be foreseen, the consequences being of such kind, which in fact happened.

Gines v. *Puerto Rico Aqueduct and Sewer Authority*, 86 P.R.R. 490, 496 (1962) (citing 2 F. Harper & F. James, *The Law of Torts* 1147 (1956)); *see also Widow of Andino* v. *Puerto Rico Water Resources Authority*, 93 P.R.R. 168, 177-79 (1966) (relying on *Gines*).

Among the "consequences of a particular type" for which a negligent actor is legally responsible are those consequences attributable to reasonably foreseeable intervening forces, including the acts of third parties.[4] *See Widow of Andino*, 93 P.R.R. at 178 (defining "intervening cause" as a cause of an injury that "comes into active operation in producing the result after the actor's negligent act or omission has occurred").

[4] This rule can also be expressed in the language of risk creation: "foreseeable intervening forces are within the scope of the original risk, and hence of the defendant's negligence." *Prosser & Keeton on Torts* § 44, at 303 (W. Keeton, 5th ed. 1984).

A negligent defendant will not be relieved of liability by an intervening cause that was reasonably foreseeable, even if the intervening force may have "directly" cause the harm. *Id.* An "unforeseen and abnormal" intervention, on the other hand, "breaks the chain of causality," thus shielding the defendant from liability. *Id.* While as a rule intervening negligent acts by third parties are more foreseeable than intentionally harmful acts, *see Estremera* v. *Inmobiliaria, Inc.*, 109 P.R.R. 1150, 1156 (1980) (citing W. Prosser, *The Law of Torts* 282-83 (4th ed. 1971)), the ultimate determinant of liability is always foreseeability itself. *Compare Negron* v. *Orozco*, 113 D.P.R. 921 (1983) (defendant liable because intervening act, though intentional and criminal, was reasonably foreseeable) *with Rivera* v. *Cruz*, __ P.R.R. __, 87 J.T.S. 51 (1987) (no liability since defendant had no reason to anticipate intervening criminal act). So, the question in this case is whether Perez Arzuaga's negligent driving, which indisputably "caused" Marshall's injuries, was the type of risk that Avis should have foreseen when it rented Marshall a car with a defective tire.

Despite this established intervening cause doctrine, Avis relies heavily on *Valle* v. *American International Insurance Co.*, 108 P.R.R. 735 (1979), which it invokes for the proposition that when an injury is due to "concurrent" causes, one cause only—the "efficient" cause—must be deemed the legal cause of the damage or injury. *Id.* at 739. Thus, according to Avis, Perez Arzuaga must be solely liable for Marshall's injuries, since his negligent driving was the "decisive fault." *Id.*

We believe that *Valle* must be limited to its own facts. Neither prior nor subsequent case law in Puerto Rico adopts this restrictive notion of efficient causation. One recent example is *Negron* v. *Orozco*, 113 D.P.R. 921, where the police department of Puerto Rico was held liable for a shooting death that occurred in the police station. Both the victim and the assailant, an off-duty officer, were being detained as a

result of a heated argument, during which the officer had threatened to shoot the victim. The Supreme Court of Puerto Rico explicitly rejected the Commonwealth's contention that the officer's criminal act (for which the Commonwealth was not liable) was the sole legal cause of the death: "The efficient and decisive cause of [decedent's] death is *a combination* of [the officer's] action, shooting his antagonist, and the omission of the police officers in charge of keeping order and security in the police station. . . ." 113 D.P.R. at 921 (emphasis supplied); *see also Widow of Andino*, 93 P.R.R. at 178 ("a defendant is liable if his negligence is a proximate cause of the damage although it might not be *the sole* proximate cause of such damage") (emphasis in original).

B. *Judge and Jury*

Here, the district court allowed the jury to determine whether Avis could reasonably have foreseen the accident that caused Marshall's injuries.[5] Referring this issue to the jury was correct under federal common law recently set forth in this circuit:

> The question of proximate causation is sometimes for the court and sometimes for the jury. Not only ordinary fact questions, but also "evaluative applications of legal standards (such as the concept of legal 'foreseeability') to the facts" are properly jury questions. In any case where there might be reasonable difference of opinion as to the evaluative determinations. . . the question is one for the jury.

Springer v. *Seamen*, No. 86-1809, slip op. at 10-1 (1st Cir. June 16, 1987) (citing *Prosser & Keeton on Torts* 320-21 (W. Keeton 5th ed. 1984)); *see also LeBoeuf* v. *Ramsey*, 503 F. Supp. 747, 758 (D. Mass. 1980) ("Applying the legal cause standard to a particular case is a function ordinarily performed by the factfinder.").

[5] Defendants do not claim the court's jury instructions were improper.

And it is federal law that must control the division of responsibility between judge and jury here. *See Molinar* v. *Western Elec. Co.*, 525 F.2d 521, 527 (1st Cir. 1975). Since Puerto Rico, a civil law jurisdiction, never uses juries in civil cases, there is of course no Commonwealth law on this subject.[6] The Seventh Amendment, however, most decidedly affords litigants in federal court in Puerto Rico the right to trial by jury, *see, e.g.*, *LaForest* v. *Autoridad de las Fuentes Fluviales de Puerto Rico*, 536 F.2d 443, 446-47 (1st Cir. 1976), and it is federal law that must define the contours of that right in this case.

In *Byrd* v. *Blue Ridge Rural Electrical Cooperative, Inc.*, 356 U.S. 525, 533-40 (1958), the Supreme Court held that the strong federal interest in the function of the jury, and in preserving the essential character of a federal court, required that in a diversity case the federal rule on this division of duties should prevail over a conflicting state rule. The court conceded that this result was not necessarily outcome-neutral:

> It may well be that in the instant personal-injury case the outcome would be substantially affected by whether the issue . . . was decided by a judge or jury. Therefore, were "outcome" the only consideration, a strong case might appear for saying that the federal court should follow the state practice.
>
> But there are affirmative countervailing considerations here.

Id. at 537.

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[6] *But cf. Estremera* v. *Inmobiliaria, Inc.*, 109 P.R.R. 1150, 1158 (1980) (quoting 3 Castan Tobenas, *Derecho Civil Espanol* 195 (10th ed. 1962)):

> [T]he difficulty in knowing up to what point one can take the causal relation can never be resolved by abstract rules in a manner that is completely satisfactory, more so, in case of doubt, it should be resolved by the judge based on his convictions and after pondering all circumstances.

This language suggests that a judge's determination of foreseeability in Puerto Rico resembles the type of inquiry common law jurisdictions usually leave to the jury. *See, e.g., Healy* v. *Hoy*, 115 Minn. 321, 132 N.W. 208 (1911) ("proximate cause is ordinarily a question of fact for the jury, to be solved by the exercise of good common sense in the consideration of the evidence of each particular case").

According to the Court, such "affirmative countervailing considerations" as the federal interest in the jury would yield to a conflicting rule of state practice only in the exceptional—and so far hypothetical—case, where the state rule were "intended to be bound up with the definition of the rights and obligations of the parties." *Id.* at 536. This is not that case. To hold otherwise would countenance an argument that proves too much. For if Puerto Rico's practice of judicially determined damages is deemed to be intimately "bound up" with the substantive rules of tort liability, then—since the practice obtains in all civil cases—the same is true of the whole of Puerto Rico's civil law. And the right to jury trial in diversity cases in federal court in Puerto Rico would be no more.

We share the dissent's concern about the forum shopping our decision apparently invites. It does appear inequitable that successful diversity plaintiffs in federal court in Puerto Rico have their damages determined by a jury, which may be inclined to redistribute from the deep pocket to the shallow, while similarly situated victors in the commonwealth's courts are relegated to judicially determined—and customarily more modest—damages awards. But we have held before that this disparity in damages awards in the federal courts and the commonwealth courts is insufficient to warrant a deviation from the principles of federal common law. *See Laforest*, 536 F.2d at 446-47 (applying federal standard for review of jury verdicts). *Cf. Hanna* v. *Plumer*, 380 U.S. 460, 466-67 (1964) (" 'Outcome-determination' analysis was never intended to serve as a talisman."). And it is by no means clear to us that the sort of forum shopping arguably engendered by the result here—the pursuit not of a preference between two substantive rules, but rather of a preference between two modes of reckoning the consequences of a single rule—is the evil that *Erie* aimed to mitigate. *See Hanna*, 380 U.S. at 475 (Harlan, J. concurring) (noting that litigants may have a preference—a perfectly permissible preference—for federal court for any number of reasons, *e.g.*, the relative attraction of the Federal Rules of Civil Procedure).

C. *The Jury's Conclusion*

Avis's assertion that the district court erred in letting the foreseeability issue go to the jury is tantamount to saying reasonable people could not differ on whether Perez Arzuaga's negligent driving was reasonably foreseeable.[7] *See Springer* v. *Seamen*, No. 86-1809, slip op. at 11. This position is untenable. Estimation of the types of risks associated with automobile breakdowns, and the incidence of negligent driving in relation to these risks, is appropriately within the province of the jury, the repository of the common sense of the community. Reasonable people—depending, perhaps, on their personal experiences with automobile tires, busy highways, and negligent fellow travelers—may indeed disagree on whether Avis could reasonably have foreseen the unfortunate consequences of its negligence here.[8] But

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[7] We see no basis for our dissenting colleague's suspicion that the jury may have in effect applied the discredited "*equivalencia de condiciones*" theory of liability here. It is far from obvious that the jury found Avis liable merely because its negligence was among the "concatenation of causes any of which might lead to injury." *See Jiminez* v. *Pelegrina*, 112 D.P.R. 881, 887 (1982) (discussing the possibility of such an untoward result under the equivalence theory); *accord Prosser & Keeton on Torts* § 41, at 266 (W. Keeton 5th ed. 1984) (noting the same risk under a "but for" causation standard). The jury's conclusion that Perez Arzuaga's negligent driving was the sort of risk reasonably foreseeable by Avis is perfectly consistent with the rule of "*causalidad adecuda*," the touchstone of which, the dissent concedes, is foreseeability. Of course, it is *possible* that the jury made its decision on an impermissible criterion, such as the equivalency theory, or the deep pocket, but it would hardly be irrational for the jury to have concluded that Perez Arzuaga's intervening negligence was not sufficiently "extraordinary" to cut off Avis's liability. That the district judge—a member of the Puerto Rico bar and, formerly, of its judiciary, *see* note 11, infra—denied defendant's motions for directed verdict and judgment n.o.v., further confirms our independent view reached after careful research of Puerto Rico precedent, that the case is fully consistent with Puerto Rico substantive law.

[8] While the substantive law of Puerto Rico is controlling here, a case from the common law jurisdiction of North Carolina presents facts sufficiently similar to warrant our attention. In *Hairston* v. *Alexander Tank & Equipment Co.*, 311 S.E.2d 559 (N.C. 1984), defendant car dealer's negligent ser

appellant asks us to conclude that reasonable people could not be in disagreement on this issue, in other words, that the conclusion the jury reached here was unreasonable. We are unwilling to do so.

II.

At trial, the issue of whether Avis was negligent revolved around the condition of the left rear tire when Marshall drove away from the Avis facility on the day of the accident. Complicating this inquiry was the fact that prior to the initiation of the suit, Avis had removed the tire from the car and disposed of it. The only physical evidence of the tire brought forth at trial were two Polaroid snapshots taken after the accident and while the tire was still on the car. With the tire unavailable, the focus of the case shifted onto the two expert witnesses Avis and the Marshalls called, each of whom offered different explanations of why the tire deflated.

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vicing of a wheel led to plaintiff's automobile breaking down on a narrow road. While inspecting the damage plaintiff was run over by a negligent driver. The Supreme Court of North Carolina found the trial court had erred in granting the car dealer's motion for judgment n.o.v., citing the "well-settled" rule that the foreseeability of an intervening act was properly for the jury:

> We hold that on the facts of this case a jury might readily find that defendant Haygood could have reasonably foreseen the subsequent acts of Alexander and the resultant harm that occurred on I-85, barely six minutes and 3.5 miles away from the Haygood dealership. Alexander's negligence in driving was, as the Court of Appeals noted, inexcusable. It was not, however, so highly improbable and extraordinary an occurrence in this series of events as to bear no reasonable connection to the harm threatened by Haygood's original negligence.

Id. at 569.

Hairston, of course, is of negligible utility in determining the appropriate legal standard to apply to the facts here. Nonetheless, *Hairston's* reasoning is persuasive, at least once it is realized that liability in both cases turns on the application of the same legal standard, to wit, the rule of foreseeability. *Cf. Reyes-Cardona* v. *J. C. Penney Co.*, 694 F.2d 894, 896 (1st Cir. 1982) (noting that differences between the civil law and the common-law sometimes are more apparent than real). Moreover, *Hairston* is support for the proposition that the jury's result in the present case, controversial though it may be, lies within the bounds of reason.

When plaintiffs moved to have their witness, Gerald Rosenbluth, qualifed as an expert, Avis objected, asserting that he lacked expertise in tire failure analysis. The district court overruled the objection. The court also overruled most of Avis's objections to specific aspects of Rosenbluth's testimony. On appeal, Avis once again raises a number of challenges to Rosenbluth's qualifications and testimony, none of which we find to have merit. A discussion of the most serious of these claims follows.

A. *Qualification of Rosenbluth as an Expert*

Fed. R. Evid. 702 provides that

> [i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

In *Mercado* v. *Wollard Aircraft Equipment, Inc.*, 574 F.2d 654, 655 (1st Cir. 1978), we stated that "whether a purported expert is sufficiently qualified to testify in a matter is within the district court's discretion, and its decision will be reversed only upon a showing of clear error." *Accord Garbincius* v. *Boston Edison Co.*, 621 F.2d 1171, 1174 (1st Cir. 1980).

The district court did not commit clear error in finding that Rosenbluth had sufficient "knowledge, skill, experience, training, or education" to testify as an expert on the cause of the tire's deflation. As was brought out at the trial, Rosenbluth's qualifications *include* substantial education in automobile technology and physical sciences; prior ownership of Automobile Technical Services, Inc., a company that was responsible for the maintenance of approximately 250 vehicles; teaching experience at various educational levels of automobile maintenance and servicing; and his employment at the time of the trial as an automotive expert for the State of

Arizona. Whether or not Rosenbluth took courses focusing exclusively on tires, his extensive automotive background —and his inevitable exposure to problems of tire maintenance and failure—provided an adequate basis for the district court to exercise its discretion in favor of letting him testify. *See Payton* v. *Abbott Labs*, 780 F.2d 147, 155 (1st Cir. 1985) (that witness was "not a specialist in the field in which he is giving his opinion affects not the admissibility of his opinion but the weight the jury may place on it").[9]

B. *Partiality of the Expert*

Avis contends that, even if Rosenbluth were otherwise qualified, his testimony should have been excluded because he was a "partisan witness." As evidence of Rosenbluth's partiality Avis cites, among other things, that Rosenbluth and plaintiffs' attorney repeatedly talked on the phone about the case; that as late as three months prior to trial Rosenbluth and the attorney were discussing various theories as to what caused the tire to deflate; and that Rosenbluth suggested evidentiary methods by which to demonstrate to the jury plaintiffs' theory of the condition of the tire and the method of its deflation.

Even assuming, without deciding, that partiality might disqualify an expert witness, we are at a loss to see how the preceding "evidence" demonstrates that Rosenbluth was improperly biased. Avis has not presented evidence that Rosenbluth agreed to lie on the stand. Rather, the examples it has listed are part of the normal communication that must take place between a lawyer and the expert he has hired to explain the techincal aspects of the case. *See generally* Fed. R. Evid. 703 (expert may base his opinion on facts explained to him before the hearing).

[9] Avis also contends that because the only evidence of the condition of the tires was the two Polaroid pictures, Rosenbluth had to be a photographic expert in addition to a tire expert. Nowhere in its appellate brief, however, did Avis demonstrate that it objected below on these grounds, and our search of the record found no such objection (although it did show that Avis vigorously cross-examined Rosenbluth on the quality of the photographs and his ability to draw conclusions from them). We therefore need not address the claim. *See United States* v. *Ven-Fuel, Inc.*, 758 F.2d 741, 760 (1st Cir. 1985).

C. *Remaining Objections*

Avis raises challenges to a host of specific opinions and statements made by Rosenbluth, claiming that they were contrary to proven facts, based on guesswork, or were otherwise misleading. We do not find that any of these statements or opinions were so utterly unsupported by the evidence to warrant reversing the district court's decision to allow them into evidence. Avis's arguments, which went to the logic, coherence, and weight of the expert's testimony rather than its admissibility, were properly left to the jury to consider. *See Payton* v. *Abbott Labs*, 780 F.2d 147, 156 (1st Cir. 1985); *Robinson* v. *Watts Detective Agency*, 685 F.2d 729, 739 (1st Cir. 1982), *cert. denied*, 459 U.S. 1204 (1983); *Manino* v. *International Manufacturing Co.*, 650 F.2d 846, 853 (6th Cir. 1981).

III.

Following the conclusion of the trial, plaintiffs moved for the imposition of attorneys' fees against Avis and Perez Arzuaga pursuant to Puerto Rico R. Civ. P. 44.1(d).[10] The district court denied the motion, finding that (1) Avis's conduct did not justify an award of fees and (2) although Perez Arzuaga was "obstinate" as defined by the rule, plaintiffs had failed to "specify[] and detail[]. . .the type of work performed, the hours spent on various tasks and whether the fee requested was consistent with the prevailing rate in the community."

Plaintifs have appealed only from that part of the district court's decision denying the award of fees against Perez Arzuaga. They contend that once the court found that Perez Arzuaga had been obstinate, it erred by completely denying the award of fees. We disagree.

[10] In *Pan American World Airways* v. *Ramos*, 357 F.2d 341 (1st Cir. 1966), we held that when a federal court is sitting in diversity and applying Puerto Rico law, the Commonwealth's Rules of Civil Procedure determine whether an award of attorneys' fees is appropriate.

Under the express terms of Rule 44.1(d), the trial court has broad discretion in deciding whether to award fees:

> Where a party has been obstinate, the court shall *in its judgment* impose on such person the payment of a sum for attorney's fees.

(Emphasis added.) *See also Serrano* v. *Lugo*, 83 P.R.R. 290, 293 (1961) ("the award of attorney's fees is discretionary with the trial court"). We cannot say that, on the facts of this case, the district court abused its discretion by refusing to impose any fees on Perez Arzuaga. The case involved two defendants, and even a cursory examination of the record demonstrates that plaintiffs focused heavily on proving Avis's liability. Without a verified account of the tasks on which plaintiffs' attorney spent his time, the district court could not assess how much of plaintiffs' efforts were devoted to the case against Avis, and how much to the case against Perez Arzuaga. The court was likewise unable to determine the effect Perez Arzuaga's obstinacy had on plaintiffs' presentation of their case. Any award of fees against Perez Arzuaga would have thus been entirely speculative. Declining to engage in such speculation was well within the district court's discretion.[11]

Affirmed.

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[11] We further observe that "obstinacy" is a concept peculiar to Puerto Rico which the experienced district judge, a member of the bar of Puerto Rico and a former member of the Puerto Rico judiciary, was well equipped to assess and apply in the circumstances of this case. *See, e.g., Rose* v. *Nashua Board of Education*, 679 F.2d 279, 281 (1st Cir. 1982) ("we are reluctant to interfere with a reasonable construction of state law made by a district judge, sitting in the state, who is familiar with that state's law and practices").

TORRUELLA, *Circuit Judge* (Dissenting). The outcome of this decision is that Avis becomes the *insurer* of all that happened as a result of its initial negligence in providing a bad tire, irrespective of the *probability* of the intervening cause taking place. This is not the law in any civil law jurisdiction which I am familiar with, and certainly not Puerto Rico. Avis was not legally required to foresee the improbable, remote, and extraordinary intervention of a third party tortfeasor whose traffic violations were the *only* cause of Marshall's injuries, *i.e.*, Marshall was not injured by a tire explosion, he was injured by Perez Arzuaga's car hitting him.

Furthermore, in my view, the public policy choices as to the boundaries of liability for negligence in Puerto Rico—traditionally reserved to the *judge* in this civil law jurisdiction—were erroneously delegated here to the jury, thus encouraging forum shopping and possibly leading to inconsistent outcomes among state and federal cases.

I.

There is reason to believe the jury applied John Stuart Mill's now discredited view of causation, which treats causation as the *total* of all the conditions of a result. *See* 2 Enneccerus, *Tratado de Derecho Civil* No. 1 at 66 (1947). "Causation, in the logical sense, is the totality of those elements indispensable for a phenomenon to take place" (translation ours). 2 Diez Picaso, Gullon, *Sistema de Derecho Civil* 634 (3d ed. 1982). This theory, characterized as "equivalencia de condiciones" or "conditio sine qua non," prescribes liability when the harm would not have occurred had defendant acted prudently. *See Sociedad de Gananciales* v. *Gonzalez Padin Co., Inc.*, __ D.P.R. __, 86 J.T.S. 23 at 4259 (1986). While "equivalencia de condiciones" remains viable today, it cannot *alone* justify causation under the Puerto Rico Civil Code. *See* M. Brau, *Danos y Perjuicios Extracontractuales en Puerto Rico* §11.03[6] at 712 (2d ed. 1986).

A commentator to the Spanish Civil Code has criticized "equivalencia de condiciones":

> If all the acts are considered the cause, the *field of responsibility is widened extraordinarily,* requiring either the distribution of responsibility among all the possible agents of said cause or the *arbitrary selection* of one of them. For example: suppose an automobile crashes into a wall and the driver is injured because of an oil stain in the pavement, the brakes of the car had been improperly repaired by a mechanic, and a pedestrian had imprudently crossed the street at the time. Thus, responsibility must be distributed among the owner of the shop, the author of the oil stain, and the pedestrian or instead select arbitrarily any one of them as responsible. Either result follows from "equivalencia de condiciones" which always requires a *hypothetical judgment among the factors which cannot be discarded from the mind without concluding that they produced the harm.*

(Translation and emphasis ours). *Sistema de Derecho Civil, supra* at 634-35.

Precisely because "equivalencia de condiciones" sets no limit to the endless chain of causation, the Supreme Court of Puerto Rico has adopted the norm of "causalidad adecuada." *See Jimenez* v. *Pelegrina Espinet,* 112 D.P.R. 700, 704-05 (1982); *Sociedad de Gananciales* v. *Jeronimo Corp.,* 103 D.P.R. 127, 134 (1974). The legal and adequate cause is one which, objectively speaking, ordinarily produces the harm according to general experience. Santos Briz, *Derecho de Danos* 215 (1963).

I agree that the key to "causalidad adecuada" is foreseeability. *Rivera Torres* v. *Cruz Corchado,* __ D.P.R. __, 87 J.T.S. 51 (May 20, 1987). To clarify this point, however, an event is foreseeble in terms of its *probability* of occurring and not its possibility. *See Pacheco* v. *A.F.F.,* 112 D.P.R. 296, 300-01 (1982). Although it is possible that someone could cause

plaintiff harm by reason of third party negligence, this was *not probable* at the time of Avis' rental. A cause is inadequate if it has come about only because of other "extraordinary circumstances," such as Perez Arzuaga's conduct in this case. *See Tratado de Derecho Civil, supra* at 68-69.

As applied here, the intervening negligence of Perez Arzuaga—if unforeseeable to Avis—constitutes the sole legal cause of harm. *See* 2 Puig Brutau, *Fundamentos de Derecho Civil* No. 3 at 101 (1983). An intervening cause is one which occurs independently from and subsequent to the negligent act of the first party (Avis), and which effectively breaks the chain of causation between that party's negligence and the harm. *Danos y Perjuicios Extracontractuales en Puerto Rico* §11.05[1] at 724-29 (1984).

II

The denial of the directed verdict motion constitutes reversible error for two reasons. First, causation—whether it be a question of fact, law or both—is for the *judge* to resolve in a civil law jurisdiction. *See Estremera* v. *Inmobiliaria, Rac, Inc.*, 109 D.P.R. 852 (1980) (quoting 3 Castan Tobenas, *Derecho Civil Espanol Comun y Foral* 237 (1978)).[12] The judge's point of view is the "most adequate" for setting the bounds of liability, *see* 31 Scaevola, *Codigo Civil* 361 (2d ed. 1974), regardless of Puerto Rico's want of expertise with juries in civil cases. *Cf. Pan American World Airways* v. *Ramos*, 357 F.2d 341, 342 (1st Cir. 1966).

Yet the majority cursorily dismisses this civil law tradition in favor of a purported federal practice or right to have "disputed

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[12] In the Sentence of 5 June 1944, the Supreme Court of Spain held that causation was a *quaestio juris*. *See Derecho Civil Espanol Comun y Foral, supra* at 236 n.1. But Manresa, in 12 *Comentarios al Codigo Civil Espanol* 855 (1973), cites from a Sentence of 30 January 1951 to the effect that causation is one of "pure fact." *See also Codigo Civil, supra* at 361. While this debate may be of import to the standard of judicial review, it does not alter the fact that the trial judge decides the issue.

questions of fact" regarding foreseeability submitted to the jury.[13] The point is that if *this* tort case had been litigated before a judge in the local courts the outcome could well have been different. However, the majority adduces no reason why the "federal interest" in having causation sent to the jury is any more important than the value of preserving uniformity of decision or why the Seventh Amendment's right to trial by jury compels such a result. *See Byrd* v. *Blue Ridge Cooperative*, 356 U.S. 525, 537 n.10 (1958). ("We intimate no view upon the constitutional question whether the right to trial by jury protected in federal courts by the Seventh Amendment embraces the factual issue of statutory immunity when asserted, as here, as an affirmative defense in a common law negligence action"); *see also* 19 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* §4508 at 126 (1982). The majority's holding invited forum shopping and I, like the Court in *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 74-75 (1938), cannot subscribe to it.

III

Second, even by the majority's standards no reasonable juror could have found adequate causation. *Karelitz* v. *Damson Oil Corp.*, No. 86-1816, slip op. at 3 (1st Cir. June 5, 1987). The cause of Marshall's injuries was *not* the defective tire. The intervening and adequate cause of the injuries was the negligent driving of a third party, Perez Arzuaga. Avis should not be held responsible for a negligent act of a third party over which it has no control. *See* 3 Santos Briz, *Derecho Civil* 577 (1973) ("responsibility should extend up to the point in which the path of causation can be directed and dominated by a person's will") (translation ours). Further, Avis could no more have foreseen that Perez Arzuaga would drive recklessly

[13] The "federal practice" is not without its critics. *See Prosser and Keeton on Torts* § 45 at 319 (5th ed. 1984) (quoting Green, *Rationale of Proximate Cause* 122-27 (1927) ("...the limitations to be imposed upon liability are always a matter for the court").

and hit Marshall than it could have foreseen that Perez Arzuaga was going to drive by, or that Marshall's tires were going to go soft where they did. Would Avis be responsible if instead of being hit by Perez Arzuaga, Marshall had been held up by Perez Arzuaga? I think not because the risk of robbery, as the risk of reckless driving, is not an ordinary, usual, and foreseeable risk of a car rental company's negligence. *See Rivera Torres, supra*; *Negron* v. *Noriega*, __ D.P.R. __, 86 J.T.S. 75 (1986); *see also Estremera*, 109 D.P.R. at 856-57; *Jacob* v. *Eagle Star Insurance Co.*, 640 F. Supp. 117, 119 (D.P.R. 1986) (applying Puerto Rico substantive law).

The only way for a jury to hold Avis responsible for Perez Arzuaga's intervening conduct is by applying "equivalencia de condiciones" and hence concluding that anything that can happen after a tire blowout is "foreseeable" by Avis. Yet under the current doctrine of "causalidad adecuada" it is not *probable* that because you have a flat tire you will be run over by a reckless driver. It is *possible* but not probable. When we get into the realm of possibilities rather than probabilities we are in the area of speculation. This then leads to the "deep pocket" theory of recovery and converts Avis into an insurer. *See Danos y Perjuicios Extracontractuales en Puerto Rico* §11.03[6](c) at 713.

I respectfully dissent.

APPENDIX B

United States Court of Appeals
For the First Circuit

No. 86-1006

JOHN G. MARSHALL, ET AL.,
PLAINTIFFS, APPELLEES,

v.

JOSE E. PEREZ ARZUAGA, ET AL.,
DEFENDANTS AND THIRD-PARTY PLAINTIFFS, APPELLEES.

AVIS RENT-A-CAR OF PUERTO RICO, INC.,
THIRD-PARTY DEFENDANT, APPELLANT.

No. 86-1007

JOHN G. MARSHALL, ET AL.,
PLAINTIFFS, APPELLANTS,

v.

JOSE E. PEREZ ARZUAGA, ET AL.,
DEFENDANTS, APPELLEES.

JUDGMENT

ENTERED: SEPTEMBER 1, 1987

These causes came on to be heard on appeals from the United States District Court for the District of Puerto Rico, and were argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: the order of the district court is affirmed.

By the Court:
FRANCIS P. SCICLIANO, Clerk.

[cc: Messrs. Cordero and Brown]

APPENDIX C

United States Court of Appeals
For the First Circuit

No. 86-1006.

JOHN G. MARSHALL, ET AL.,
PLAINTIFFS, APPELLEES,

v.

JOSE E. PEREZ ARZUAGA, ET AL.,
DEFENDANTS AND THIRD-PARTY PLAINTIFFS, APPELLEES.

AVIS RENT-A-CAR OF PUERTO RICO, INC.,
THIRD-PARTY DEFENDANT, APPELLANT.

Before
CAMPBELL, *Chief Judge*,
COFFIN, BOWNES, BREYER, TORRUELLA and SELYA,
Circuit Judges.

ORDER OF COURT
Entered: September 28, 1987

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:
FRANCIS P. SCIGLIANO, Clerk.

[cc: Messrs. Cordero and Brown]

APPENDIX D

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U.S. DISTRICT COURT
SAN JUAN, P.R.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CIVIL No. 83-0966 GG.

JOHN G. MARSHALL, et al.,
PLAINTIFFS,

v.

JOSE E. PEREZ ARZUAGA, et al.,
DEFENDANTS AND THIRD-PARTY PLAINTIFFS,

v.

AVIS RENT-A-CAR OF PUERTO RICO, INC., et al.,
THIRD-PARTY DEFENDANTS.

OPINION AND ORDER

Plaintiffs brought this case against defendants and their insurance companies for damages suffered as the result of an accident. Jurisdiction was based on diversity of citizenship.

After a seven-day trial, the jury returned a verdict for plaintiffs and against defendants, Jose E. Perez Arzuaga and Avis Rent-A-Car of Puerto Rico, Inc. (Avis). The jury apportioned the negligence of the defendants at 60% and 40%, respectively. Damages were awarded as follows:

John G. Marshall	$400,000.00
Margaret Marshall	200,000.00
John G. Marshall, Jr.	75,000.00
Kerry Ann Marshall	75,000.00

Co-defendant Avis who had previously moved for a directed verdict, has now filed motions for judgment notwithstanding the

verdict and for a new trial. Plaintiffs, on the other hand, are seeking an award of attorney's fees and prejudgment interest.

Avis asks this court to order that, notwithstanding the verdict, judgment be entered for Avis on the grounds that there was insufficient evidence to sustain the verdict of the jury and there was no proximate cause between plaintiffs' damages and the conduct of Avis.[1] In the alternative, Avis is petitioning the court for a new trial on the issue of damages with regard to plaintiffs excepting John G. Marshall.

The standard of review in setting aside a jury verdict is narrowly circumscribed. In order to set aside a verdict, and grant a new trial, a trial judge must determine that "the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a clear miscarriage of justice." *Coffran* v. *Hitchcock Clinic, Inc.*, 683 F.2d 5, 6 (1st Cir.), *cert. denied*, 459 U.S. 1087 (1982); *Borras* v. *Sea-Land Service, Inc.*, 586 F.2d 881, 886-87 (1st Cir. 1978). The judge's duty is to exercise limited discretion. He should not interfere with the verdict unless it is clear that the jury has reached a seriously erroneous result. *Borras, supra*, 586 F.2d at 887. Nor may a jury verdict that is supported by the evidence be set aside simply because the trial judge or the appellate court would have reached a different result. *CVD Incorporated* v. *Raytheon Co.*, 769 F.2d 842 (1st Cir. 1985).

In its motion for new trial, Avis argues that the sums allotted to those co-plaintiffs who did not suffer any physical injuries should be deemed shocking to the conscience of the court. Avis further contends that in Puerto Rico such an award would be considered grossly outrageous by the Supreme Court. Avis specifically challenges the reasonableness of plaintiff's wife's award and the amount awarded to plaintiff's two teenage children.

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[1] As additional grounds for its motion, Avis alleged that the reading of the complaint to the jury was prejudicial to the defendant. We will not consider this argument since it is a proper issue to be raised on appeal and not under a Rule 50(b) motion.

At outset we note that in diversity actions the excessiveness of a jury award is not measured according to the state's standard of review, but according to that ordinarily applied in the federal courts. *Lakin* v. *Daniel Marr & Son Co.*, 732 F.2d 233 (1st Cir. 1984). After considering all the evidence and the inferences therefrom in the light most favorable to plaintiff, *Stathos* v. *Bowden*, 728 F.2d 15 at 17 (1st Cir. 1984); *Betancourt* v. *J. C. Penney Co., Inc.*, 554 F.2d 1206 at 1207 (1st Cir. 1977), we must let the award stand unless it "shock[s] the conscience of the court." *Stathos, supra*, 728 F.2d at 21; *Clark* v. *Taylor*, 710 F.2d 4, 13 (1st Cir. 1983); *Kolb* v. *Goldring, Inc.*, 694 F.2d 869, 871 (1st Cir. 1982).

Although the grand total awarded is definitely not high, the amount awarded to the children and wife may be considered high but not so high under the circumstances to shock the conscience of this court.

The jury had before it compelling evidence as to the mental and moral anguish suffered by plaintiff's wife as well as her loss of support, consortium, society, services and affection of her husband. Both children testified as to the breakdown in the family relationship and how the changes in their father's behavior had changed their life and created a distance between them and their father. From the evidence adduced the jury could reasonably conclude that these plaintiffs have suffered and will continue to suffer considerable mental anguish and the loss of a meaningful family life. We must bear in mind that placing a value on human suffering is always a subjective enterprise, which turns on the jury's sensibilities to the facts and circumstances presented in a particular case. *McDonald* v. *Federal Laboratories, Inc.*, 724 F.2d 243, 247 (1st Cir. 1984). Even if we might have awarded a lesser amount to these three co-plaintiffs, we cannot state that the jury overstepped its bounds so as to "shock the conscience" of this court. Thus, the motion for new trial must be denied.

A motion for judgment notwithstanding the verdict shall be granted only if after reviewing the evidence in the light most favorable to the nonmoving party, no conclusion but one can be reasonably drawn. *United States* v. *Articles of Drug Consisting of the Following*, 745 F.2d 105, 113 (1st Cir. 1984), *cert. denied, subnom.*, __ U.S. __, 105 S.Ct. 1358 (1985); *Rios* v. *Empresas Lineas Maritimas Argentinas*, 575 F.2d 986, 990 (1st Cir. 1978), *accord*, *Robinson* v. *Watts Detective Agency*, 685 F.2d 729, 733 (1st Cir. 1982), *cert. denied*, 459 U.S. 1105 and 459 U.S. 1204 (1983). Applying this standard, we find there is sufficient evidence in the record from which the jury could have reasonably found as they did. *Cf. Engine Specialties, Inc.* v. *Bombardier Ltd.*, 605 F.2d 1, 9 (1st Cir. 1979), *cert. denied*, 446 U.S. 983 (1980).

Although there was conflicting evidence in this case, the verdict was not against the weight of the evidence. Plaintiff's proffered more than ample expert testimony and other evidence to make out their case. Moreover, when conflicting evidence is adduced, from which contradictory inferences may be drawn, it is the role of the jury to make the ultimate determinations of fact. *See Engines Specialties, Inc., supra*, 605 F.2d at 9.

Since we find that there is sufficient evidence in the record to support the jury's verdict, the motion for judgment notwithstanding the verdict must also be denied.

Finally, plaintiffs have requested that attorney's fees be awarded. It is axiomatic that in diversity cases we apply the state law. *Erie R. Co.* v. *Thompkins*, 304 U.S. 64, 58 S.Ct. 817 (1938). In Puerto Rico the doctrine is that only when a defendant answers the complaint, denies the initial allegations of the complaint, and in so doing prolongs the case, thus compelling plaintiff to continue with the proceedings, can it be said that he acted with obstinacy. *See Vda. de Passalacqua* v. *Cancel*, 90 D.P.R. 501 (1964); *United States Casualty Co.* v. *Tribunal Superior*, 89 D.P.R. 785 (1964). Specifically, pur-

suant to Rule 44.1(d) of the Rules of Civil Procedure of Puerto Rico, the court must impose the payment of attorney's fees if it finds that a party has been obstinate. *See Pan American Airways* v. *Ramos*, 357 F.3d 341 (1st Cir. 1966). However, such an award is left to the sound discretion of the district court and the judge must first find that the party against whom attorney's fees and pre-judgment interest is requested has been obstinate. *Heddinger* v. *Ashford Memorial Community Hosp.*, 734 F.2d 81 (1st Cir. 1984).

Here, we find that Avis did not act with temerity or obstinacy and in fact, made an honest and good faith effort to defend a legally tenable position. Thus, no award of attorney's fees can be assessed against Avis.

Regarding Mr. Perez Arzuaga, who appears to be judgment-proof, there is no question that he was obstinate. We must note, however, that the request for attorney's fees was opposed on the ground that the blanket unverified statement claiming 919 hours at $90.00 per hour for a total of $82,710.00, was clearly insufficient. The lodestar method requires the specifying and detailing of the type of work performed, the hours spent on various tasks and whether the fee requested was consonant with the prevailing rate in the community. Without this information, the court is not in any position to determine attorney's fees under the lodestar method. Despite the above, plaintiffs have made no effort to provide adequate substantiation of the work performed.

As far back as *Souza* v. *Southworth*, 564 F.2d 609, 612 (1st Cir. 1977), our circuit warned that a failure to document time "might merit disallowal, or at least drastic reduction, of a fee award." This was more recently reaffirmed in *Wojtkowski* v. *Cade*, 725 F.2d 127, 130 (1st Cir. 1984) where attorneys were advised to maintain detailed, contemporaneous time records. However, in *Grendel's Den, Inc.* v. *Larkin*, 749 F.2d 945 (1st Cir. 1984), in which the well-known constitutional attorney Laurence H. Tribe was involved, our circuit court took the additional step of requiring such contemporaneous time records and expressed as follows:

> ...in cases involving fee applications for services rendered after the date of this opinion, the absence of detailed contemporary time records, except in extraordinary circumstances, will call for a substantial reduction in any award or, in egregious cases, disallowance.

In the instant case, we find it is fair to apply this standard since the petition is completely bereft of support and not the slightest effort has been made to comply with the legal strictures enunciated in *Grendel's Den*, *supra*. This being the situation, no hearing is required. Thus, the request for attorney's fees and prejudgment interest must be denied.

WHEREFORE, in view of the foregoing, plaintiffs' motions requesting a new trial, a judgment notwithstanding the verdict, and an award of attorney's fees and prejudgment interest are hereby DENIED.

SO ORDERED.

San Juan, Puerto Rico, this 12th day of November, 1985.

(s) GILBERTO GIERBOLINI
GILBERTO GIERBOLINI
U.S. District Judge

2/s: Jose A. Candelario
Charles Cordero
Herbert Brown III
(Illegible)
11/15/85

Supreme Court, U.S.
FILED
JAN 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1083

In the Supreme Court of the United States

October Term, 1987

AVIS RENT-A-CAR OF PUERTO RICO, INC.,
PETITIONER,

v.

JOHN G. MARSHALL, ET ALS,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

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In the
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AVIS RENT-A-CAR OF PUERTO RICO, INC.,
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v.

JOHN G. MARSHALL, ET ALS,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

Statement of the Case

Preliminary Statement

This is a diversity action brought by John G. Marshall, his wife, and two minor children for near fatal and permanent physical injuries caused when defendant/petitioner, Avis Rent-A-Car of Puerto Rico, Inc. ("Avis"), rented a vehicle to Mr. Marshall which had an improperly maintained, worn and leaking rear left tire. The accident occurred when the referenced tire went flat, causing Marshall to have to get out of the vehicle, where he was struck by another vehicle driven by codefendant Jose E. Perez Arzuaga.

Counterstatement of Facts

On August 23, 1982, Marshall and his wife rented a vehicle at the Avis Terminal facilities located near the Luis Munoz International Airport in San Juan, Puerto Rico. Several days later while driving the vehicle he hit a pothole, causing the right front tire to go flat. He changed the flat tire and replaced it with a "balloon" spare tire and returned to the Avis facility for a replacement. Avis service personnel changed both front tires but not the rear ones which were original equipment, having been on the car for over nine months and 15,000 miles. The evidence at trial established that a proper inspection of the rear tires, rather than the cursory inspection conducted by Avis personnel, would have revealed that the rear left tire was worn and leaking air.

Soon after Marshall departed the rental facility, he felt the car commence to vibrate. After traveling a distance of approximately 200 yards, he stopped on the far right side of the right-hand exit lane. The distance traveled from the Avis facility was less than a mile. After checking for oncoming traffic, Marshall exited the Avis vehicle. When he reached the rear left tire, he noticed that it was flat. He then kicked the tire, swore and turned to walk back to the door. He was immediately struck by a passing vehicle driven by Jose E. Perez Arzuaga. In addition to suing the passing motorist, Marshall brought suit against Avis for having negligently provided him with a vehicle equipped with an improperly maintained, worn, and leaking tire, thereby putting him at risk of an injury of the type which occurred.

Proceedings Below

At the conclusion of the presentation of Marshall's case, Avis moved for dismissal of the complaint. The District Court denied Avis' motion. After the presentation of defendant's case, Avis again renewed its motion to dismiss and it was again denied. Following seven days of trial, the case was allowed to

go to the jury. The jury returned a verdict for plaintiffs, fixing Avis' responsibility for the accident at 40% and that of the passing motorist at 60%. Total damages were awarded in the amount of $750,000. Subsequent motions by Avis for judgment n.o.v., or alternatively for a new trial, were denied. (A-23).[1] The trial judge, in denying the motions, found that there was "sufficient evidence in the record from which the jury could have reasonably found as they did." (A-26). On appeal to the First Circuit Court of Appeals, the judgment of the District Court was affirmed (Judge Torruella dissenting). (A-1). A petition for rehearing and suggested rehearing en banc was likewise denied. (A-22). Avis now petitions this Court for a writ of certiorari.

Petitioner raises essentially two arguments before this Court. Petitioner argues for the first time that notwithstanding the Seventh Amendment, this case should have been tried without a jury. Avis also argues that the denial of the directed verdict should be reversed as no reasonable juror (or Judge) could have found adequate causation. These arguments will be addressed separately.

Argument

I. That Pursuant to the Seventh Amendment of the United States Constitution, in Diversity Actions Such as This, Brought in the Federal District Court of Puerto Rico, the Issue of Causation Was Properly Submitted to the Jury for Determination.

Succinctly stated, the issue which petitioner now raises for the first time is whether the Seventh Amendment right to trial by jury applies to civil actions brought under diversity jurisdiction in the District Court of Puerto Rico. The argument advanced is simply that, "Neither Puerto Rico's Constitution nor its laws recognize nor provide for trial by jury in civil

[1] References are to the appendix contained in the petition for writ of certiorari filed by Avis.

cases." Therefore, according to Avis, not only the issue of causality, but presumably the entire case, should have been decided by the trial judge. This argument was first raised in the dissenting opinion of Appellate Judge Torruella, who after noting that "causation—whether it be a question of fact, law or both—is for the judge to resolve in a civil law jurisdiction" (A-18), went on to state, "The point is that if this tort case had been litigated before a judge in the local courts the outcome could well have been different". (A-19). Though not specifically stated, it is suggested by Judge Torruella's dicta that the Seventh Amendment right to trial by jury in civil diversity cases brought in federal court, does not exist in Puerto Rico.[2]

The Seventh Amendment of the United States Constitution provides that:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved..."

To argue that the issue of foreseeability (and presumably all liability issues, including damages) should have been decided by a judge and not a jury, simply because Puerto Rico never uses juries in civil cases, is to ignore that in diversity cases as in other cases, the right to trial by jury in federal courts is to be determined as a matter of Federal law. *Simler* v. *Connor*, 372 U.S. 221, 222 (1963); *Byrd* v. *Blue Ridge Rural Electrical Cooperative, Inc.*, 356 U.S. 525, 533-40 (1958); *Molinar* v. *Western Electric Company*, 525 F.2d 521, 527 (1st Cir. 1975); *Christopherson* v. *Humphrey*, 366 F.2d 323 (10th Cir. 1966).

This court, as far back as *Parson* v. *Bedford*, 28 U.S. (3 Pet.) 433, 446 (1830), has expressed that the "common law" as contained in the Seventh Amendment, includes not merely suits recognized under traditional notions of common law, but suits "in which legal rights were to be ascertained and determined".

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[2] But cf. *In Re N-500L Cases*, 517 F.Supp. 821, 823-824 (D.C. P.R. 1981) where then U.S. District Judge Torruella reached the opposite conclusion.

In Puerto Rico the "common law" referred to in the Seventh Amendment is the civil law as contained in the Civil Code of Puerto Rico. It is precisely the Civil Code which provides Puerto Rico's substantive law on tortious liability. Title 31 Laws of Puerto Rico Annotated, Sections 5141-5149, Articles 1802-1810 Puerto Rico Civil Code; *Valle* v. *American International Insurance Co.*, 108 P.R.R. 735 (1979); *Rivera* v. *Central Pasto Viejo, Inc.*, 44 P.R.R. 236 (1932).

It has been held that "civil plaintiffs in the federal district court of Puerto Rico are entitled under the seventh amendment to a trial by jury." *LaForest* v. *Autoridad de las Fuentes Fluviales de Puerto Rico*, 536 F.2d 443, 446 (1st Cir. 1976). The same conclusion has been reached in Louisiana, which like Puerto Rico is a civil law jurisdiction. There, it has been consistently held that the Seventh Amendment requires trial by jury in the Louisiana equivalence of common law actions, when the action is brought in the federal district courts of Louisiana by reason of diversity jurisdiction. *Wright* v. *Paramount-Richards Theatres*, 198 F.2d 303 (5th Cir. 1952).

Puerto Rico's requirement of having issues of fact, law or both, determined by a judge and not a jury, is not a "rule intended to be bound up with the definition of the rights and obligations of the parties." *Byrd* v. *Blue Ridge*, at 536. Rather it merely fixes a historical form or mode of reckoning. As has been noted by this Court, "The [Seventh] amendment thus may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the particular form which they may assume to settle legal rights." *Parson* at 446.

Petitioner adopts Judge Torruella's statement in his dissent that the construction of the majority of the Court of Appeals leads to the "deep pocket" theory of recovery and converts Avis into an insurer. As correctly noted by Chief Judge Campbell in the majority opinion:

> But we have held before that this disparity in damages awards in the federal courts and in the commonwealth courts is insufficient to warrant a deviation from the principles of federal common law. See LaForest, 536 F. 2d at 446-47 (applying federal standard for review of jury verdicts). Cf. Hanna v. Plumer, 380 U.S. 460, 466-67 (1964) (" 'Outcome-determination' analysis was never intended to serve as a talisman.") (A-9)

Petitioner voiced no objection regarding the substantive law instructions on proximate cause or causality which were given to the jury. Neither did it object that the instructions were given to the jury in the first place. Avis did not raise the jury challenge prior to the commencement of the trial, at the conclusion of the plaintiff's case, nor prior to the submission of the case to the jury. It was not raised in any post-trial motions, nor was it raised in any brief filed before the Court of Appeals. As we have noted previously, the issue was first raised in dicta by the dissenting Appellate Judge. Avis' failure to interpose a timely objection constitutes a waiver, or in the alternative, the submission of the case to the jury for determination of the issue of causality, is a harmless error. *Hurwitz* v. *Hurwitz*, 136 F.2d 796, 799 (D.C. Cir. 1943).

II. That the Denial of the Directed Verdict Was Proper, as Reasonable Persons (Juror or Judge) Could Differ on the Issue of Adequate Causation.

Whether determined by a jury or by a judge, the issue is still the same. Avis should have reasonably foreseen that by renting a car with an improperly maintained, worn, and leaking tire, it exposed Marshall to the risk of the injuries which he suffered. It is petitioner's contention that Avis could not have reasonably foreseen that by providing Marshall with an improperly maintained, worn, and leaking tire, it placed him at risk of an accident of the type that occurred. As noted by the

Court of Appeals, this position "is tantamount to saying reasonable people could not differ on whether Perez' negligent driving was reasonably foreseeable." (A-10). We do not believe that petitioner's argument needs to be scrutinized beyond noting that in denying Avis' motion for judgment n.o.v., the trial Judge, "a member of the Puerto Rico Bar and, formerly, of its judiciary" (A-10 at Note 7) found that there was "sufficient evidence in the record from which the jury could have reasonably found as they did." (A-26).

Conclusion

In view of the foregoing, respondents respectfully submit that the petition for writ of certiorari be denied.

Respectfully submitted,

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